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NO. 01-1385

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Insitution at Waymart; COMMONWEALTH OF PENNSYLVANIA,
Petitioners,

v.

GEORGE E. BANKS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY

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ARGUMENT IN REPLY

Petitioners offer the following brief argument in reply to Banks' response to the Petition for Writ of *Certiorari*. The issues are numbered in the order that Banks has presented them.

I. This Court should grant the writ to reaffirm that *Teague v. Lane* does not become irrelevant if the state court rejects the claim on the merits.

In their petition for writ of *certiorari*, petitioners explained that the Third Circuit has adopted a novel and potentially far-reaching interpretation of the 1996 amendments to the habeas statute, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The panel held that, under the new law, "we do not need to focus on anything other than the reasoning and determination of the Pennsylvania Supreme Court." App. 28. Because the state court did not discuss the problem of retroactivity, the panel concluded, the federal courts cannot do so either. App. 29-30. The panel went on to grant relief based on an alleged violation of Mills v. Maryland, 486 U.S. 367 (1988), without any retroactivity analysis at all -- despite the fact that Mills was decided after Banks' judgment became final, and despite the government's argument that Mills should not be applied retroactively.

In his response, Banks argues that the Third Circuit's decision was not based on the 1996 amendments to the habeas statute, but on Teague itself. That is, as Banks interprets the decision, the Third Circuit has held that Teague

did not create a general bar against retroactive application of new rules: instead, Teague prevents retroactive application *only* where the new rule is "not considered" by the state courts. Brief in Opposition at 2.

If Banks is correct, the Third Circuit's decision has no arguable legal basis at all, and there is even more reason to grant *certiorari* in this case. As petitioners have explained, this Court has repeatedly held that a federal habeas court *must* address retroactivity if the government timely asserts it. Petition at 5-6. This mandatory rule does not change depending on whether the state court addressed retroactivity first. See Petition at 6-7 (citing cases where this Court applied Teague where state court had not addressed retroactivity question). Teague protects the finality of old convictions, not merely where the state court specifically relied on it, but to protect against endless relitigation of criminal judgments and to ensure that similarly situated defendants are treated similarly. Banks apparently believes that the Third Circuit has now chosen to reach a different result simply because it believes Teague serves a narrower purpose than those this Court has identified. Not only is such a result unlawful -- the Third Circuit is, after all, bound to follow the precedent of this Court -- but it would create a circuit split. See Glock v. Singletary, 65 F.3d 878, 889 (11th Cir. 1995) (state court's denial of relief on the merits, without retroactivity analysis, does not moot Teague issue; federal court is still obligated to address retroactivity if state raises it).[1] These are reasons to grant *certiorari*, rather than deny it.

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[1] Banks' attempt to distinguish Glock is particularly weak. In that case, Glock sought to take advantage of Espinosa v. Florida, 505 U.S. 1079 (1992), a case decided after his own conviction became final. The prosecution

In any event, Banks is wrong about the Third Circuit's reasoning. The court explained its refusal to undertake retroactivity analysis this way: "To determine whether the Pennsylvania Supreme Court's ruling in *Banks* was *contrary to, or involved an unreasonable application of, Supreme Court precedent*, we do not need to undertake any retroactivity analysis, because, notably, the Pennsylvania Supreme Court undertook none." App. 29-30 (emphasis added). This is not a random choice of words: the italicized portion is a quote from the AEDPA standard of review. 28 U.S.C. § 2254(d)(1). The meaning is clear: In the opinion of the Third Circuit, AEDPA, which requires deference to reasonable state court decisionmaking, precludes consideration of matters not addressed by the state court. Here, the state court did not address retroactivity, and the Third Circuit concluded it could not do so, either.

This erroneous view of AEDPA -- which was not supported by a single case citation -- has far-reaching implications. Indeed, the Third Circuit's decision is already being cited for the proposition that new constitutional rules may be applied to older convictions even if the Court has already held that the rule is non-retroactive. For example, in Beasley v. Horn, No. 00-111 (E.D. Pa.), the petitioner -- a

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argued that Espinosa was not retroactive, and the Eleventh Circuit agreed; the court also held that the state court's willingness to apply Espinosa retroactively did not obviate the need for Teague analysis. Banks insists that the state courts did not reject the Espinosa claim on the merits; he apparently believes that the state court's rejection of the claim as "without merit" is code for something else. This argument is rather difficult to fathom.

death-sentenced Pennsylvania prisoner -- has cited the panel's opinion in support of his claim under Caldwell v. Mississippi, 472 U.S. 320 (1985). The Pennsylvania Supreme Court rejected Beasley's Caldwell claim on the merits; citing the opinion below, Beasley now argues that the district court is precluded from considering the government's retroactivity argument. But this Court has held that Caldwell is not retroactive. See Sawyer v. Smith, 497 U.S. 227 (1990). Indeed, in Sawyer itself, the state court also rejected the Caldwell claim on the merits on collateral review, but this Court applied the rule against retroactivity anyway. In other words, according to Beasley, Sawyer is no longer the law -- the Third Circuit has said so.

The Third Circuit's refusal to apply the rule of nonretroactivity contradicts this Court's decisions, and promises to disturb many older convictions. This Court should grant *certiorari* to reaffirm that federal habeas courts *must* apply Teague if the government timely raises it.

II. The Pennsylvania Supreme Court's rejection of Banks' *Mills* claim was a reasonable application of this Court's precedent.

For the most part, petitioners are content to rely on their merits argument as set out in the Petition for Writ of *Certiorari*. Petitioners do, however, wish to add two brief points.

First: Banks argues that the Pennsylvania Supreme Court's analysis of the Mills claim was flawed because the Court did not "examine the entire jury instruction," but rather focused on the disputed passage and focused on its similarity to language the Court had already approved in other cases.

Respondent's Brief at 3. According to Banks, this approach violated both Mills and Boyde v. California, 494 U.S. 370 (1990). This is different from the Third Circuit's analysis. That is, Banks now argues that the state court's approach was *contrary to* Mills and Boyde -- its scope of review was supposedly too narrow. The panel, on the other hand, held that the state supreme court had *unreasonably applied* Mills and Boyde -- it used the right standard but reached an unreasonably wrong result. App. 35-36 n.21. In fact, the Pennsylvania Supreme Court used the right standard -- it relied upon Mills and noted that it had upheld similar instructions many times. Commonwealth v. Banks, 656 A.2d 467, 470-71 (Pa. 1995). The Court also explained that neither the verdict slip nor the polling of the jury were likely to confuse the jury or create a Mills violation. Id. This approach was not "contrary to" Mills, Boyde, or any other precedent from this Court.

Banks also argues that the Third Circuit performed a better analysis than did the state supreme court, and that its conclusion made more sense. Respondent's Brief at 3. Petitioners disagree. In any event, that is not the question -- the only issue here is whether the state court's decision was *reasonable*. The Third Circuit was determined, however, to exercise its "independent judgment" on the Mills issue, App. 29 n.15, as if that were the appropriate standard. It is not: As pointed out by the Criminal Justice Legal Foundation in its proposed *amicus* brief, the "independent judgment" standard upon which the panel relied was from the *dissent* in Williams v. Taylor, 529 U.S. 362, 389 (2000). The majority in Williams squarely rejected this view and held the opposite -- that under AEDPA, deference to reasonable state court decisionmaking is *required*. 529 U.S. at 403.

The Third Circuit thus did not abide by the AEDPA standard of review as this Court has defined it. *Certiorari* should be granted to correct the error and to prevent dilution of the AEDPA standard. Furthermore, as explained in the petition, the merits decision here potentially impacts dozens of Pennsylvania capital cases. Petition at 15; App. 123-27 (excerpt from *amicus* brief by Pennsylvania Attorney General in support of *en banc* rehearing). The importance of the issue to the people of this Commonwealth is yet another reason to grant review.

III. This Court should decide whether *Mills* applies retroactively.

Banks argues that "the Teague/Mills issue is not ripe for adjudication" because the Third Circuit did not decide it. Respondent's Brief at 4. If this Court concludes that the Court of Appeals should have addressed the issue, he suggests that the case be remanded to give the panel another chance.

Such a remand would be pointless. There is already a circuit split on the retroactivity of Mills, and that split would only deepen if the Third Circuit decided the question. In fact, as petitioners explained in their initial brief, the Third Circuit has already issued conflicting *dicta* on the subject. Petition at 14-15. The time has come to clear up the confusion.

Furthermore, the retroactive reach of Mills is just the sort of important legal issue that calls for this Court's intervention sooner rather than later. Many other cases, in Pennsylvania and elsewhere, may hang in the balance. Under similar circumstances, this Court has addressed the retroactivity of new constitutional rules where the Court of

Appeals failed to do so. See Graham v. Collins, 506 U.S. 461 (1993) (rejecting challenge to Texas death penalty statute on retroactivity grounds, where Court of Appeals rejected claim on merits). See also Goeke v. Branch, 514 U.S. 115, 117-19 (1995) (claim that state's fugitive dismissal rule was unconstitutional rejected on retroactivity grounds, where Court of Appeals had held that state had waived retroactivity argument); Saffle v. Parks, 494 U.S. 484 (1990) (proposed rule that sentencing instructions violated Eighth Amendment would be subject to Teague bar; Court of Appeals had not addressed retroactivity issue).

George Banks was convicted and sentenced twenty years ago. No purpose will be served by yet more delay. This Court should decide whether Mills applies retroactively to cases like this one.

CONCLUSION

For the reasons set forth above, as well as the reasons given in their initial brief, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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